Supreme Court, U.S.
FILED
APR 3 - 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 14-556, 14-562, 14-571, 14-574

In The

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.,

Respondents.

[Additional Case Captions Listed On Inside Front Cover]

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF EARL M. MALTZ; GEORGE W. DENT, JR.; CHRISTOPHER WOLFE; AND THE MARRIAGE LAW FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

HERBERT G. GREY
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
503-641-4908
herb@greylaw.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

VALERIA TANCO, ET AL.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,

Respondents.

APRIL DEBOER, ET AL.,

Petitioners,

v.

RICHARD SNYDER, ET AL.,

Respondents.

GREGORY BOURKE, ET AL.,

Petitioners,

v.

STEVE BESHEAR,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE WOULD SERIOUSLY DEPART FROM THIS COURT'S PRECEDENTS BECAUSE IT LACKS ANY HISTORICAL FOUNDATION	3
A. SUBSTANTIVE DUE PROCESS REQUIRES AN HISTORICAL FOUNDATION EVEN IF *GLUCKSBERG* DOES NOT CONTROL	3
B. MARRIAGE BETWEEN A MAN AND A WOMAN IS AMONG THE MOST DEEPLY-ROOTED INSTITUTIONS IN ANGLO-AMERICAN LAW	10
C. THE SAME 50-YEAR PERSPECTIVE THAT INFLUENCED *LAWRENCE* SHOWS THAT SAME-SEX MARRIAGE HAS BEEN WIDELY AND SPECIFICALLY REJECTED BY THE AMERICAN PEOPLE	27
CONCLUSION	37

TABLE OF AUTHORITIES

Page

CASES:

A. v. *A.*, 43 A.2d 251 (Del. Super. 1945) 26

Allen v. *Baker*, 86 N.C. 91 (1882) 23

Askew v. *Dupree*, 30 Ga. 173 (1860) 19

Atherton v. *Atherton*, 181 U.S. 155 (1901) 22

Baehr v. *Lewin*, 852 P.2d 44 (Haw. 1993).....29

Baehr v. *Miike*, No. 20371, 1999 Haw. LEXIS 391 (Dec. 9, 1999).....29

Baker v. *Baker*, 13 Cal. 87 (1859).....21

Baker v. *Nelson*, 191 N.W.2d 185 (Minn. 1971) 28

Baker v. *Nelson*, 409 U.S. 810 (1972).....28

BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996).....5

Carmichael v. *State*, 12 Ohio St. 553 (1861).....19

Church of Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993).....9

Cnty. of Sacramento v. *Lewis*, 523 U.S. 833 (1998).....5, 8

Collins v. *City of Harker Heights*, 503 U.S. 115 (1992).....6

Compassion in Dying v. *Washington*, 79 F.3d 790 (9th Cir. 1995) 10

Davis v. *Davis*, 106 A. 644 (N.J. Ch. 1919) 25

De Burgh v. *De Burgh*, 250 P.2d 598 (Cal. 1952).....25

TABLE OF AUTHORITIES – Continued

Page

Dist. Atty's Office v. *Osborne*, 557 U.S. 52 (2009) 4, 6

Goodridge v. *Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) 32

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 5, 6, 7

Grover v. *Zook*, 87 P. 638 (Wash. 1906) 25

Hamaker v. *Hamaker*, 18 Ill. 137 (1856) 21

Head v. *Head*, 2 Ga. 191 (1847) 21

Heup v. *Heup*, 72 N.W.2d 334 (Wis. 1969) 26

Hollingsworth v. *Perry*, 570 U.S. ___, 133 S. Ct. 2652 (2013) 2, 35

Howay v. *Howay*, 264 P.2d 691 (Idaho 1953) 26

In re Oldfield's Estate, 156 N.W. 977 (Iowa 1916) 26

In re Rash's Estate, 53 P. 312 (Mont. 1898) 26

In re St. Clairs Estate, 28 P.2d 894 (Wyo. 1934) 26

Inhabitants of Town of Milford v. *Inhabitants of Town of Worcester*, 7 Mass. 48 (1810) 18, 19

Jackman v. *Rosenbaum Co.*, 260 U.S. 22 (1922) 6

Jones v. *Hallahan*, 501 S.W.2d 588 (Ky. 1973) 28, 31

Kennedy v. *Kennedy*, 134 So. 201 (Fla. 1931) 26

Kerrigan v. *Dep't of Pub. Health*, 957 A.2d 407 (Conn. 2008) 33

Lawrence v. *Texas*, 539 U.S. 563 (2003) ..... *passim*

Ledoux v. *Her Husband*, 10 La. Ann. 663 (1855) 20

TABLE OF AUTHORITIES – Continued

Page

Lewis v. *Ames*, 44 Tex. 319 (1875) 22

Loving v. *Virginia*, 388 U.S. 1 (1967) 7, 8, 9

Mahnken v. *Mahnken*, 82 N.W. 870 (N.D. 1900) 26

Matchin v. *Matchin*, 6 Pa. 332 (1847) 19

McDonald v. *Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010) 4

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 4, 8, 9

Michael H. v. *Gerald D.*, 491 U.S. 110 (1989) 6, 7, 9, 36

Mirizio v. *Mirizio*, 150 N.E. 605 (N.Y. Ct. App. 1926) 26

Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 6, 9

Murphy v. *Ramsey*, 114 U.S. 15 (1885) 22

O'Connor v. *O'Connor*, 253 N.E.2d 250 (Ind. 1969) 25

Planned Parenthood v. *Casey*, 505 U.S. 833 (1992) 7

Poe v. *Ullman*, 367 U.S. 497 (1961) 4, 5, 10, 37

Reno v. *Flores*, 507 U.S. 292 (1993) 6

Reynolds v. *Reynolds*, 85 Mass. 605 (1862) 20

Reynolds v. *United States*, 98 U.S. 145 (1879) 21, 22

Roche v. *Washington*, 19 Ind. 53 (1862) 11

Singer v. *Hara*, 522 P.2d 1187 (Wash. App. 1974) 28

Sissung v. *Sissung*, 31 N.W. 770 (Mich. 1887) 21

TABLE OF AUTHORITIES – Continued

Page

Skinner v. *State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942) 24

Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 4

State v. *Bittick*, 15 S.W. 325 (Mo. 1891) 22

Turner v. *Safley*, 482 U.S. 78 (1987) 9

United States v. *Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) 2, 33

Varnum v. *Brien*, 763 N.W.2d 862 (2009) 33

Washington v. *Glucksberg*, 521 U.S. 702 (1997) 3, 4, 5, 10

Wills v. *Wills*, 82 S.E. 1092 (1914) 26

Woods v. *Moten*, 30 So. 324 (Ala. 1901) 20

Wray v. *Wray*, 19 Ala. 522 (1851) 21

Zablocki v. *Redhail*, 434 U.S. 374 (1978) 9

Zoglio v. *Zoglio*, 157 A.2d 627 (D.C. 1960) 26

CONSTITUTIONAL PROVISIONS:

FRAME OF GOVERNMENT OF PENNSYLVANIA – 1682 art. 19, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1872) 15

HAW. CONST., art. I § 4 29

KY. CONST. § 233A 34

TABLE OF AUTHORITIES – Continued

Page

MAGNA CARTA art. 7 (1215), *reprinted in* J.C. HOLT, MAGNA CARTA (2d ed. 1992) 13

MICH. CONST. art. I § 25 33

MISS. CONST. art. 12 § 22 (1868), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1872) 20

TENN. CONST. art. XI § 18 35

TEX. CONST. art. 12 § 27 (1868), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1872) 20

THE FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF EAST NEW JERSEY IN AMERICA, ANNO DOMINI 1683, art. 20, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (1909) 15

U.S. CONST. amend. XIV ..... *passim*

STATUTORY PROVISIONS

Acts and Orders of 1647, Marriage, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY (Donald S. Lutz ed., 1998) 15

TABLE OF AUTHORITIES – Continued

Page

An Act Concerning Marriages, § 3 (1741), *reprinted in* 1 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA (Francois-Xavier Martin ed., 1804) 16, 31

An Act Concerning Marriages, ch. 23, § 1 (1738-1741), *reprinted in* 1 LAWS OF THE STATE OF NORTH CAROLINA (Hen. Potter et al. eds., 1821) 17

An Act for Regulating the Solemnization of Marriages, ch. 41, § 1 (1798), *reprinted in* 2 THE STATUTE LAW OF KENTUCKY, 1798-1801 (1810) 16, 31

An Act for the Better Observing the Lord's Day Called Sunday, the 30th of January, the 29th of May the 22nd of September; And Also, for the Suppressing Prophaness, Immorality & Divers Other Vicious & Enormous Crimes, ch. 7, § 15 (1715), *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA (Walter Clark ed., 1904) 15

An Act Regulating Marriages, § 1 (1820), *reprinted in* 1 LAWS OF THE TERRITORY OF MICHIGAN (1871) 16, 30

An Act Regulating Marriages, ch. 6, § 1 (1803), *reprinted in* 1 THE STATUTES OF OHIO AND OF NORTHWESTERN TERRITORY (Salmon P. Chase ed., 1833) 16

An Act Regulating of Marriages (1779), *reprinted in* VERMONT STATE PAPERS (William Slade ed., 1823) 17

TABLE OF AUTHORITIES – Continued

Page

An Act to Ascertain the Ways and Means by which Persons May Gain a Settlement in Any Town or District Within this State, So as to Entitle Them to Support Therein, If They Shall Be Poor and Unable to Support Themselves, § 1 (1796), *reprinted in* THE LAWS OF THE STATE OF NEW HAMPSHIRE (1815) 17

An Act to Authorize and Confirm Marriages in Certain Cases, ch. 35, art. 3 (1783), *reprinted in* 11 THE STATUTES AT LARGE (William Waller Hening ed., 1823) 17

An Act to Prevent Incestuous Marriages and to Regulate Divorces § 2, *reprinted in* THE LAWS OF THE STATE OF NEW HAMPSHIRE (1815) 17

An Act to Prevent Incestuous Marriages, Laws of New Hampshire (1759), *reprinted in* ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE, IN NEW ENGLAND (1761) 15

Edmunds Anti-Polygamy Act of 1882, 22 Stat. 30 21

Edmunds-Tucker Act of 1887, 24 Stat. 635 21

Ky. Rev. Stat. §§ 402.005, 402.020, 402.045 31

Marriages and Married Persons § 3, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS (1890) 15

Mich. Comp. Laws § 551.1 31

Mich. Comp. Laws § 551.2 31

Morrill Anti-Bigamy Act of 1862, 12 Stat. 501 21

TABLE OF AUTHORITIES – Continued

Page

Ohio Rev. Code § 3101.01(A)(1) 33

Poland Act of 1874, 18 Stat. 253 21

Tenn. Code § 36-3-113(a) 31

Utah Enabling Act of 1894, 28 Stat. 107 21

LEGISLATIVE MATERIALS:

118 Cong. Rec. § 4389 (daily ed. Mar. 21, 1972) 29

KENTUCKY LEGISLATIVE RESEARCH COUNCIL, PROPOSED MARRIAGE AMENDMENT, 2004 34

S. Debate, 108th Cong., 2nd Sess. (2004) 34

OTHER AUTHORITIES:

1 WILLIAM BLACKSTONE, COMMENTARIES 14

2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (George Woodbine ed., Samuel E. Thorne trans., 1968) 13

2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 75 (2d ed. 1832) 23

2 MODEL PENAL CODE AND COMMENTARIES § 213.2 (1980) 32

2 THE DIGEST OF JUSTINIAN 199, 23.2.1 (Alan Watson ed., 1985) 12

A. PARLETT LLOYD, A TREATISE ON THE LAW OF DIVORCE (1887) 24

ANDREW HORNE, THE MIRROUR OF JUSTICES, ch. 5, § 1 (W.H. of Gray's Inn trans., 1768) 13

TABLE OF AUTHORITIES – Continued

Page

CYNTHIA B. PATTERSON, THE FAMILY IN GREEK HISTORY (1998) 12

DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995 (1996) 28

EDWARD COKE, THE REPORTS, *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE (Steve Sheppard ed., 2003) 13

Fowler Group to Have Bus Tour Promoting Marriage Amendment, THE CHATTANOOGAN, Oct. 27, 2006 35

FRANK KEEZER, THE LAW OF MARRIAGE AND DIVORCE § 8 (1906) 26, 27

Frederic William Maitland, *Magistri Vacarii Summa de Matrimonio, in* 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND (H.A.L. Fisher ed., 1911) 11

Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95 (1991) 18

JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS § 11 (1905) 26, 27

JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 29, 225 (1st ed. 1852) 19, 24

JOHN AYLIFFE, PARAGON JURIS CANONICI ANGLICANI (1726) 14

TABLE OF AUTHORITIES – Continued

Page

JOHN BOUVIER, INSTITUTES OF AMERICAN LAW §§ 235-36 (Daniel A. Gleason ed., 1882) 24

JOHN FRASER MACQUEEN, THE RIGHTS AND LIABILITIES OF HUSBAND AND WIFE (3d ed. 1885) 14

JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2d ed. 2012) 12

JOSEPH R. LONG, TREATISE ON THE LAW OF DOMESTIC RELATIONS § 3 (1905) 26

KENTUCKY BAR ASSOCIATION, HOT TOPICS IN DISSOLUTION OF MARRIAGE ACTS – THE STATUS OF SAME SEX MARRIAGE AND DIVORCE (2014) 32, 34

MICHAEL L. SATLOW, JEWISH MARRIAGE IN ANTIQUITY (2001) 12

Musonius Rufus, *Fragment 13A, What is the Chief End of Marriage?, in* MUSONIUS RUFUS: THE ROMAN SOCRATES (Cora E. Lutz, ed. & trans., 1947) 12

Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973) 29

Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979) 29

SENATE FISCAL AGENCY, NOVEMBER 2004 BALLOT PROPOSAL 04-2 33

TABLE OF AUTHORITIES – Continued

Page

SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (Liberty Fund ed., 2010) 12

ST. AUGUSTINE, ADULTEROUS MARRIAGES, bk. II, ch. 12, *reprinted in* THE FATHERS OF THE CHURCH: ST. AUGUSTINE TREATISES ON MARRIAGE AND OTHER SUBJECTS (Charles T. Wilcox trans., 1995) 12

STORY, COMMENTARIES ON THE CONFLICTS OF LAW § 200 (4th ed. 1852) 23

THE OHIO BALLOT BOARD, OHIO ISSUES REPORT: STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004 GENERAL ELECTION 34

THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 2001) 11

THOMAS AQUINAS, OF GOD AND HIS CREATURES (Joseph Rickaby ed. & trans., 1905) 12

ZEPHANIAH SWIFT, 1 A SYSTEM OF THE LAWS OF CONNECTICUT (1795) 18, 23

I

INTEREST OF *AMICI CURIAE*

Amici are distinguished scholars of constitutional history.[1] Their decades of research and teaching convince them that American history offers no support for construing the Fourteenth Amendment as a mandate for same-sex marriage. Their names and affiliations (for identification purposes only) follow:

Earl M. Maltz, Distinguished Professor, Rutgers School of Law-Camden.

George W. Dent, Jr., Professor of Law, Case Western Reserve University School of Law.

Christopher Wolfe, Professor, University of Dallas.

These scholars are joined by the Marriage Law Foundation, which has consistently sought to explain and defend the nearly universal understanding of marriage as an institution uniting a husband and a wife.

---

[1] The parties have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

A fundamental right to same-sex marriage would be unprecedented because it lacks an historical foundation. Historical support is a necessary condition of substantive due process. Relevant precedents show that the Court has required some historical support before venturing to recognize a new substantive right under the Due Process Clause.

Marriage between a man and a woman is among the most deeply rooted institutions in Anglo-American law. Legal authorities stretching from the English common law to the late twentieth century agree that marriage refers solely to man-woman unions and that its core purpose is to establish a stable institution for the protection of children. State laws like Michigan's and the other respondent States' are consistent with this longstanding tradition affirming conjugal marriage.

Same-sex marriage was repeatedly rejected during the same half-century period that governed *Lawrence* v. *Texas*, 539 U.S. 563 (2003). Its current recognition by a majority of States is the result of lower court decisions issued since *Hollingsworth* v. *Perry*, 570 U.S. ___, 133 S. Ct. 2652 (2013), and *United States* v. *Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013) – not voluntary changes made by the people and their elected representatives.

The living tradition of American law refutes petitioners' due process claim. Without an historical

foundation, petitioners' due process claim should be denied.

ARGUMENT

A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE WOULD SERIOUSLY DEPART FROM THIS COURT'S PRECEDENTS BECAUSE IT LACKS ANY HISTORICAL FOUNDATION.

A. SUBSTANTIVE DUE PROCESS REQUIRES AN HISTORICAL FOUNDATION EVEN IF *GLUCKSBERG* DOES NOT CONTROL.

Petitioners argue that State laws like Michigan's deprive them of "the fundamental right to marry," which they say consists of "[t]he ability freely to choose one's spouse." 14-571 Br. Pets. at 21, 56. *Amici* add that "neither history nor tradition should save laws prohibiting same-sex marriage." Brief for Professors Laurence H. Tribe & Michael C. Dorf as Amici Curiae Supporting Petitioners at 15, *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571, 14-574 (Tribe Brief). We disagree.

Petitioners' substantive due process claim is controlled by *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). A correct application of its "established method of substantive due process analysis," *id.* at 720, denies that marrying a person of the same sex is a fundamental right, *see* Brief for Scholars of History and Related Disciplines as Amici Curiae Supporting

Respondents. Failure to satisfy *Glucksberg* should dispose of petitioners' due process claim.

Glucksberg is a landmark decision that retains precedential force. *See McDonald* v. *Chicago*, 561 U.S. ___, 130 S. Ct. 3020, 3036 (2010); *Dist. Atty's Office* v. *Osborne*, 557 U.S. 52, 62 (2009). Even if *Glucksberg* were not controlling, historical inquiry would remain a necessary element of substantive due process analysis.

History did not suddenly become an element of substantive due process analysis in *Glucksberg*. For decades substantive due process was closely tied to history. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), led the way by holding that due process "denotes . . . those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399 (emphasis added). Justice Cardozo, writing for the Court, added that due process extends only to liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934).

Justice Harlan's dissent in *Poe* v. *Ullman*, 367 U.S. 497 (1961), laid out a flexible and contextually-sensitive approach to substantive due process. He described "the due process of law" as a balance between "liberty and the demands of organized society." *Id.* at 542 (Harlan, J., dissenting). While resisting any rigid "formula," other than "judgment and

restraint," he placed history at the center of his constitutional framework:

> The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Id. For Justice Harlan, this concept of a living tradition supplied the baseline against which to measure a law to determine whether it offended due process.

History figured, too, in his separate opinion in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). There Justice Harlan explained that "[j]udicial self-restraint" demanded "continual insistence upon respect for the teachings of history. . . ." *Id.* at 501 (Harlan, J., concurring in the judgment).

Members of the Court, writing more recently, have highlighted the importance of history for substantive due process. *See, e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring); *Cnty. of Sacramento* v. *Lewis*, 523 U.S. 833, 858 (1998) (Kennedy, J., concurring); *Glucksberg*, 521 U.S. at 767 (Souter, J., concurring in the judgment).

History has been deemed so vital to substantive due process claims that the absence of supporting

historical evidence has doomed them. *See Collins* v. *City of Harker Heights*, 503 U.S. 115, 126 (1992); *Reno* v. *Flores*, 507 U.S. 292, 303 (1993); *Osborne*, 557 U.S. at 702. These decisions reflect Justice Holmes's insight that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

The Court's "continual insistence upon respect for the teachings of history" serves to enhance "[j]udicial self-restraint." *Griswold*, 381 U.S. at 501. Substantive due process has been "a treacherous field," in part because of the risk of subjectivity "when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.). As the Court has acknowledged, "guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. Hard experience – exemplified by the *Lochner* era – has made the Court "reluctant to expand the concept of substantive due process." *Id.* It has tended, instead, to approach novel claims with "the utmost care." *Id.* That is why, "[i]n an attempt to limit and guide interpretation of the Clause," an asserted liberty interest must "be an interest traditionally protected by our society." *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (footnote omitted).

Insisting that an asserted liberty interest boast *some* historical support does not entail a particular level of generality. Petitioners need not frame their interest at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127-28 n.6; *see Planned Parenthood* v. *Casey*, 505 U.S. 833, 847-48 (1992). But they must show that an asserted right to substantive protection under the due process clause is sufficiently rooted in historical practice to avoid the risk of outright subjectivity. Granting that much does not dictate "a single mode of historical analysis." *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part).

Respecting history as a necessary element of substantive due process does not pre-commit the Court to a mode of analysis that would have precluded the outcomes in *Griswold* or *Loving*, or even *Lawrence*.

Certainly, Justice Harlan found adequate historical support for the right to be free of arbitrary impositions on the marital relationship. *See Griswold*, 381 U.S. at 500-01 (Harlan, J., concurring in the judgment).

Loving did not disregard history. It vindicated "[t]he clear and central purpose of the Fourteenth Amendment . to eliminate all official state sources of invidious racial discrimination in the States." *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Whatever historical evidence Virginia and other States offered

50 years ago as a pretext for "measures designed to maintain White Supremacy," *id.* at 11, could not justify laws that flagrantly contradicted the constitutional text. *Loving* did not signal the abandonment of history as an element of substantive due process, as later decisions establish.

Lawrence (to the extent it counts as a substantive due process case) did not reject historical inquiry either. It conceded that "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." 539 U.S. at 572 (quoting *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring)). While focusing on "our laws and traditions in the past half century," *id.* at 571-72, the Court did not recognize a right to intimate autonomy lacking in historical support.

In short, this Court has consistently held that recognizing a substantive due process right requires an historical foundation. A sufficient nexus between an asserted liberty interest and the actual traditions and practices of American law constrains the exercise of judicial discretion in an area where objective guideposts are otherwise scarce. By "historical foundation" we do not mean a search for evidence of original understanding only. It suffices to view petitioners' due process claim from the perspective of Justice Harlan's living tradition of American law.

Turning to this case, the right-to-marry decisions directly rely on the history and traditions surrounding marriage. *Meyer* recognized that, among the

rights "long recognized at common law," was the right "to marry, establish a home and bring up children." 262 U.S. at 399. Succeeding decisions affirming the right to marry relied on *Meyer* as critical precedent. *See Loving*, 388 U.S. at 7; *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978); *see also Turner* v. *Safley*, 482 U.S. 78, 95 (1987) (citing *Loving* and *Zablocki*).[2] These and other decisions proclaim that "the Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (footnote omitted and emphasis added); *see also Michael H.*, 491 U.S. at 122 n.2. ("This insistence that the asserted liberty interest be rooted in history and tradition is evident, as elsewhere, in our cases according constitutional protection to certain parental rights.").

Amici argue that petitioners' due process claim depends on whether the right to marry is given "a narrowed definition." Tribe Br. at 7. In particular, they insist that petitioners' asserted liberty interest should not be denied "simply because there is no longstanding tradition protecting *same-sex* marriage. There is undoubtedly a longstanding tradition

---

[2] *Amici* misconceive *Zablocki* and *Turner*. *See* Tribe Br. at 8. Neither decision involved the wholesale redefinition of marriage. Both turned, instead, on the requirement of narrow tailoring. *See Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) (reading *Zablocki* as a case of underinclusiveness).

protecting marriage, and under this Court's cases, that suffices." *Id.* This line of argument boldly seeks to revive the discredited theory of substantive due process holding that "earlier legislative or judicial recognition of the right or interest is not a *sine qua non*." *Compassion in Dying* v. *Washington*, 79 F.3d 790, 805 (9th Cir. 1995) (Reinhardt, J.), *rev'd*, *Glucksberg*, 521 U.S. 702. But a history-free version of substantive due process would contradict the Court's post-*Lochner* efforts to constrain its exercise.

Even if *Glucksberg* does not control, petitioners' due process claim still requires some historical support. The Court should determine, with respect to marriage, "what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). Our research concludes that (1) marriage between a man and a woman is deeply rooted in Anglo-American law; and (2) during the past half century same-sex marriage has been generally rejected. The asserted liberty to marry a person of the same sex stands outside the living tradition of American law.

B. MARRIAGE BETWEEN A MAN AND A WOMAN IS AMONG THE MOST DEEPLY-ROOTED INSTITUTIONS IN ANGLO-AMERICAN LAW.

In 1862 – during the same decade the Fourteenth Amendment was adopted – the Indiana Supreme

Court asked: "What, then, constitutes the thing called a marriage? . . It is the union of one man and one woman."[3] That same conception of marriage fills the pages of English and American history. No brief could adequately capture the wealth of historical evidence affirming the character and purposes of traditional marriage. But as the following research illustrates, traditional marriage is among the Nation's most firmly established institutions.

1. Marriage is expressed as the union of a man and a woman in the earliest records of English law. Anglo-Saxon law evinces the opposite-sex character of marriage.[4] Vacarius, a twelfth-century teacher of Roman law in England, explained marriage as "the mutual delivery (traditio) of man and woman each to each. The man delivers himself as husband, the woman delivers herself as wife."[5] This precept of Roman law is a reminder that the Anglo-American conception of marriage "inherited from ancient Greece and Rome the idea that marriage is a union of a single man and a single woman who unite for the

---

[3] *Roche* v. *Washington*, 19 Ind. 53, 57-59 (1862).

[4] *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 648 (5th ed. 2001).

[5] *See* Frederic William Maitland, *Magistri Vacarii Summa de Matrimonio*, *in* 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 93 (H.A.L. Fisher ed., 1911) (quoting Vacarius).

purposes of mutual love and friendship and mutual procreation and nurture of children."[6]

Maitland depicted the twelfth- and thirteenth-century "essentials of a valid marriage" as "the consent to be husband and wife and the sexual union."[7] During that same period, the Magna Carta used

---

[6] JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 17 (2d ed. 2012); *accord* 2 THE DIGEST OF JUSTINIAN 199, 23.2.1 (Alan Watson ed., 1985) ("Marriage is the union of a man and a woman, a partnership for the whole life involving divine as well as human law."); ST. AUGUSTINE, ADULTEROUS MARRIAGES, bk. II, ch. 12, *reprinted in* THE FATHERS OF THE CHURCH: ST. AUGUSTINE TREATISES ON MARRIAGE AND OTHER SUBJECTS 116-17 (Charles T. Wilcox trans., 1995); THOMAS AQUINAS, OF GOD AND HIS CREATURES (Joseph Rickaby ed. & trans., 1905) ("Matrimony, then, as consisting of the union of male and female, intending to beget and educate offspring for the worship of God, is a Sacrament of the Church. . . ."); Musonius Rufus, *Fragment 13A, What is the Chief End of Marriage?*, *in* MUSONIUS RUFUS: THE ROMAN SOCRATES 89 (Cora E. Lutz, ed. & trans., 1947) ("The husband and wife . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them. . . ."); MICHAEL L. SATLOW, JEWISH MARRIAGE IN ANTIQUITY 39 (2001) (for Hellenistic Jewish writers and Palestinian rabbis, the reasons to marry are "remarkably close to those articulated by the stoics: it is a man's duty to marry in order to create a household, an essential goal of which is the reproduction of children"); *see also* CYNTHIA B. PATTERSON, THE FAMILY IN GREEK HISTORY 16-17, 23-27 (1998) (ancient Greek culture tolerated homosexual conduct while restricting marriage between husband and wife).

[7] SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 384 (Liberty Fund ed., 2010), http://oll.libertyfund.org/titles/2314.

gendered terms in delimiting legal rights associated with marriage.[8] Bracton wrote that "[f]rom [the *jus gentium*] comes the union of man and woman, entered into by the mutual consent of both, which is called marriage. . . From that same law there also comes the procreation and rearing of children."[9] Andrew Horne also stated that "a contract of marriage is good by the consent of the wills of men and women."[10]

Marriage remained largely unchanged by the seventeenth century. Lord Coke's Reports contain a Latin reference translated as "the union of husband and wife . . [is] by the law of nature."[11] John Ayliffe noted that "[m]arriage is a lawful coupling and joining together of Man and Woman in one individual State or Society of Life."[12]

---

[8] MAGNA CARTA art. 7 (1215), *reprinted in* J.C. HOLT, MAGNA CARTA 453 (2d ed. 1992) ("After her husband's death, a widow shall have her marriage portion and her inheritance at once and without any hindrance. . . .").

[9] 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 27 (George Woodbine ed., Samuel E. Thorne trans., 1968), *available at* http://bracton.law.harvard.edu/.

[10] ANDREW HORNE, THE MIRROUR OF JUSTICES, ch. 5, § 1, at 234 (W.H. of Gray's Inn trans., 1768).

[11] EDWARD COKE, THE REPORTS, *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 198 & nn. 135-36 (Steve Sheppard ed., 2003) (editor's translation).

[12] JOHN AYLIFFE, PARAGON JURIS CANONICI ANGLICANI 359 (1726).

Blackstone's *Commentaries*, so influential among American lawyers at the Founding, conceived of marriage in similar terms. Among "[t]he three great relations in private life," he placed "[t]hat of *husband and wife*; which is founded in nature, but modified in civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated."[13] Blackstone further explained that "the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation."[14]

2. Colonial laws were no less uniform in their conception of marriage as the relation of a man and a woman. An early Rhode Island act spoke of a "contract or agreement between a Man and a Woman to owne each other as Man and Wife" creating a "lawfull

---

[13] 1 WILLIAM BLACKSTONE, COMMENTARIES *410.

[14] *Id.* at *435 (citation omitted); *accord* JOHN FRASER MACQUEEN, THE RIGHTS AND LIABILITIES OF HUSBAND AND WIFE 1-2 (3d ed. 1885) ("The Contract of Marriage, by which man and woman are conjoined in the strictest society of life till death or divorce shall separate them, is the most ancient, the most important, and the most interesting of the domestic relations.").

marriage" before witnesses.[15] A Pennsylvania law prescribes the solemnization of marriage "by taking one another as husband and wife, before credible witnesses."[16] New Jersey's 1683 constitution referred to marriage as "taking one another as husband and wife."[17] Other legal measures regulating life in the American colonies were premised on marriage as an opposite-sex union.[18]

---

[15] Acts and Orders of 1647, Marriage, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 178-79 (Donald S. Lutz ed., 1998), http://lf-oll.s3.amazonaws.com/titles/694/Lutz_0013_EBk_v6.0.pdf.

[16] FRAME OF GOVERNMENT OF PENNSYLVANIA – 1682 art. 19, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1525 (2d ed. 1872).

[17] THE FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF EAST NEW JERSEY IN AMERICA, ANNO DOMINI 1683, art. 20, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 2581 (1909).

[18] *See, e.g.*, Marriages and Married Persons § 3, *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 101 (1890) (prohibiting "young men" from seeking to "draw away the affections of young Maidens, under pretence of purpose of Marriage, before their Parents have given way and allowance in that respect"); An Act to Prevent Incestuous Marriages, Laws of New Hampshire (1759), *reprinted in* ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW HAMPSHIRE, IN NEW ENGLAND 50-51 (1761) (directing that "no man shall marry any woman within the degrees hereafter nam'd in this act"); An Act for the Better Observing the Lord's Day Called Sunday, the 30th of January, the 29th of May the 22nd of September; And Also, for the Suppressing Prophaness, Immorality & Divers Other Vicious & Enormous Crimes, ch. 7, § 15 (1715), *reprinted in* 23 THE STATE RECORDS OF

(Continued on following page)

3. States during the revolutionary era and immediately after were no less committed to the traditional institution of marriage.

Each of the State respondents has marriage laws dating from the 1700s and 1800s. In Tennessee, a law enacted in 1741 while under the government of North Carolina, referred to a minister joining parties to a marriage "together as man and wife."[19] A Kentucky law enacted in 1798, prohibited ministers from celebrating "the rites of matrimony between any persons, or join[ing] them together as man and wife, without lawful license."[20] While still a territory, Michigan enacted a law authorizing "male persons of the age of eighteen years, and female persons of the age of fourteen years . . [to] be joined in marriage."[21] An Ohio statute of 1803 is virtually identical.[22]

NORTH CAROLINA, 1715-1716, at 5-6 (Walter Clark ed., 1904) (framing a criminal offense in terms of a "man or woman" who "live together as Man & Wife").

[19] An Act Concerning Marriages, § 3 (1741), *reprinted in* 1 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 41 (Francois-Xavier Martin ed., 1804).

[20] An Act for Regulating the Solemnization of Marriages, ch. 41, § 1 (1798), *reprinted in* 2 THE STATUTE LAW OF KENTUCKY, 1798-1801, at 64-65 (1810).

[21] An Act Regulating Marriages, § 1 (1820), *reprinted in* 1 LAWS OF THE TERRITORY OF MICHIGAN 646, 646 (1871).

[22] An Act Regulating Marriages, ch. 6, § 1 (1803), *reprinted in* 1 THE STATUTES OF OHIO AND OF NORTHWESTERN TERRITORY 354 (Salmon P. Chase ed., 1833).

When Virginia experienced a shortage of certified clergy, the Commonwealth adopted a statute declaring "good and valid in law" all marriages made "openly and solemnly" where the relationships "have been consummated by the parties cohabiting together as husband and wife."[23] North Carolina and Vermont marriage solemnization laws from that period similarly referred to marriage as "join[ing] them together as man and wife"[24] and "join[ing] any man or woman together in marriage."[25]

New Hampshire law dealt with the character of marriage obliquely. It prohibited "any man or woman" within certain degrees of consanguinity from "intermarry[ing]"[26] and indicated that "[a] married woman shall have settlement of her husband."[27]

---

[23] An Act to Authorize and Confirm Marriages in Certain Cases, ch. 35, art. 3 (1783), *reprinted in* 11 THE STATUTES AT LARGE 282 (William Waller Hening ed., 1823).

[24] An Act Concerning Marriages, ch. 23, § 1 (1738-1741), *reprinted in* 1 LAWS OF THE STATE OF NORTH CAROLINA 129 (Hen. Potter et al. eds., 1821).

[25] An Act Regulating of Marriages (1779), *reprinted in* VERMONT STATE PAPERS 292 (William Slade ed., 1823).

[26] An Act to Prevent Incestuous Marriages and to Regulate Divorces § 2, *reprinted in* THE LAWS OF THE STATE OF NEW HAMPSHIRE 336 (1815).

[27] An Act to Ascertain the Ways and Means by which Persons May Gain a Settlement in Any Town or District Within this State, So as to Entitle Them to Support Therein, If They Shall Be Poor and Unable to Support Themselves, § 1 (1796), *reprinted in* THE LAWS OF THE STATE OF NEW HAMPSHIRE 336 (1815).

The first published legal treatise in the United States described marriage – the "connexion between husband and wife" – as "the most important, and endearing relation, that subsists between individuals of the human race."[28] This treatise explained that "[t]his connexion between the sexes, has been maintained in all ages, and in all countries; tho the rights and duties of it have been various, as well as the modes and ceremonies, by which it is contracted."[29]

4. Nineteenth century authorities, before and after adoption of the Fourteenth Amendment, reaffirmed prior understandings concerning marriage and its key purposes.[30]

In 1805, a Massachusetts court described marriage as "an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife."[31] The court further explained that the purpose of marriage is to "regulate . . . the intercourse between the sexes; and to

---

[28] ZEPHANIAH SWIFT, 1 A SYSTEM OF THE LAWS OF CONNECTICUT 183 (1795).

[29] *Id.*

[30] *See generally* Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 97 (1991) (For "the lawmakers and the theologians who constructed the nineteenth century marriage ceremony .. marriage was created by the contract of a woman and a man.").

[31] *Inhabitants of Town of Milford* v. *Inhabitants of Town of Worcester*, 7 Mass. 48, 52 (1810).

multiply, preserve, and improve the species."[32] A Pennsylvania court explained that "the paramount purposes of the marriage – the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world."[33]

This understanding of marriage appears in decisions issued near the Civil War. An 1860 Georgia decision described marriage "'a civil status, existing in one man and one woman, legally united for life for those civil and social purposes, which are based in the distinction of sex.'"[34] An 1861 Ohio decision ruled that "'[m]arriage, in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world.'"[35]

California laws of this period "did not expressly state that marriage could be entered into only by a man and a woman, [but] the statutes clearly were intended to have that meaning and were so understood." The same was true of laws in Florida, Iowa, and Kansas.

---

[32] *Id.*

[33] *Matchin* v. *Matchin*, 6 Pa. 332, 337 (1847).

[34] *Askew* v. *Dupree*, 30 Ga. 173, 176-77 (1860) (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 29 (1st ed. 1852)).

[35] *Carmichael* v. *State*, 12 Ohio St. 553, 555-56 (1861).

Following the Civil War, former slave States took steps to accord legal recognition to the family relationships of African-Americans. Alabama enacted a law declaring "to be man and wife" freed slaves "now living together recognizing each other as man and wife."[36] A Texas constitutional provision adopted in 1868 speaks of persons who "lived together as husband and wife, and both of whom, by the law of bondage were precluded from the rites of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married."[37] Mississippi's 1868 Constitution similarly referred to persons "cohabitating as husband and wife" as being held "for all purposes in law, as married."[38]

Judicial opinions articulated the link between marriage and procreation. An 1862 Massachusetts case held that "one of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union."[39] Other courts were no less forthright in

---

[36] *See Woods* v. *Moten*, 30 So. 324, 325 (Ala. 1901).

[37] TEX. CONST. art. 12 § 27 (1868), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1819 (2d ed. 1872).

[38] MISS. CONST. art. 12 § 22 (1868), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1094 (2d ed. 1872).

[39] *Reynolds* v. *Reynolds*, 85 Mass. 605, 610 (1862). *See also Ledoux* v. *Her Husband*, 10 La. Ann. 663, 664-65 (1855).

identifying procreation as a central purpose of marriage.[40]

Adoption of the Fourteenth Amendment did not disturb the universal understanding of marriage as the union of a man and a woman for the protection of their children. Any doubt on that score ought to be resolved by the federal government's campaign to extirpate the practice of polygamy in U.S. territories.[41] Harsh enforcement of that federal policy was determined by this Court to be consistent with the national government's authority: "Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."[42]

---

[40] *Head* v. *Head*, 2 Ga. 191, 205 (1847); *Wray* v. *Wray*, 19 Ala. 522, 525 (1851); *Hamaker* v. *Hamaker*, 18 Ill. 137, 141 (1856); *Baker* v. *Baker*, 13 Cal. 87, 103 (1859); *Sissung* v. *Sissung*, 31 N.W. 770, 772 (Mich. 1887).

[41] Congress passed five statutes to repress the development of polygamy as a recognized marriage system in the United States: the Morrill Anti-Bigamy Act of 1862, 12 Stat. 501; the Poland Act of 1874, 18 Stat. 253; the Edmunds Anti-Polygamy Act of 1882, 22 Stat. 30; the Edmunds-Tucker Act of 1887, 24 Stat. 635; and the Utah Enabling Act of 1894, 28 Stat. 107. The Morrill Anti-Bigamy Act, approved by Congress in 1862 and signed by President Abraham Lincoln, criminalized attempts to engage in polygamy in federal territories. These measures sought to establish heterosexual monogamy as the single form of marriage legally permitted in the territories.

[42] *Reynolds* v. *United States*, 98 U.S. 145, 165 (1879).

Drawing on themes expressed in *Reynolds*, this Court extolled traditional marriage. It portrayed marriage as "the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."[43] In another decision, this Court again declared, "A husband without a wife, or a wife without a husband, is unknown to the law."[44]

Reconstruction era decisions confirmed the same conception of marriage and its essential purposes. Texas law defined marriage as a "mutual agreement of a man and woman to live together in the relation and under the duties of husband and wife."[45] Missouri law understood marriage in similar terms, as "the civil status of one man and one woman . . united by contract and mutual consent for life, for the discharge of the duties legally incumbent on those whose association is founded on the distinction of sex."[46] The North Carolina Supreme Court added that the "legitimate[ ] objects sought to be attained by . agreements to marry" include "the gratification of the

---

[43] *Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885).

[44] *Atherton* v. *Atherton*, 181 U.S. 155, 162 (1901).

[45] *Lewis* v. *Ames*, 44 Tex. 319, 341-42 (1875).

[46] *State* v. *Bittick*, 15 S.W. 325, 327 (Mo. 1891).

natural passions rendered lawful by the union of the parties; and the procreation of children."[47]

Nineteenth-century treatise writers warmed to these themes. Chancellor Kent wrote that "[t]he primary and most important of the domestic relations, is that of husband and wife."[48] Calling it "one of the chief foundations of social order," he credited marriage with "a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts."[49] Justice Story similarly explained that marriage "may exist between two individuals of different sexes" and that it "[u]pon it the sound morals, the domestic affections, and the delicate relations and duties of parents and of children essentially depend."[50] Joel Prentiss Bishop, nineteenth-century America's leading expert on family law, he described marriage as "a civil status, existing in one man and one woman legally united for life for those

---

[47] *Allen* v. *Baker*, 86 N.C. 91, 97 (1882).

[48] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 75 (2d ed. 1832); *accord* ZEPHANIAH SWIFT, 1 A SYSTEM OF THE LAWS OF CONNECTICUT 183 (1795).

[49] 2 KENT, COMMENTARIES 75.

[50] STORY, COMMENTARIES ON THE CONFLICTS OF LAW § 200 (4th ed. 1852).

civil and social purposes which are based in the distinction of sex."[51]

Interestingly, Bishop rejected same-sex marriage as void: "Marriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of every marriage . . that the parties should be of different sex."[52] Agreeing with Bishop, another commentator said that "[a] wedding ceremony, civil or religious, uniting persons of the same sex, is of course void *ab initio*, and no legal proceedings are necessary to annul it."[53]

7. State laws from the first half of the twentieth century rested on the universal belief that marriage brings together a man and a woman for the purpose of procreation.

This Court's holding that "[m]arriage and procreation are fundamental to the very existence and survival of the race,"[54] mirrored State court decisions

---

[51] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 29 (1st ed. 1852); *accord* JOHN BOUVIER, INSTITUTES OF AMERICAN LAW §§ 235-36 (Daniel A. Gleason ed., 1882).

[52] BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, at § 225.

[53] A. PARLETT LLOYD, A TREATISE ON THE LAW OF DIVORCE 18 (1887).

[54] *Skinner* v. *State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

of that day. The Washington Supreme Court held that "[o]ne of the most important functions of wedlock is the procreation of children. Offspring are the natural result, and ofttimes the chief purpose, of marriage."[55] A New Jersey court made the same point.[56] A 1952 decision by the California Supreme Court explored this connection between marriage and procreation:

> The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage.[57]

---

[55] *Grover* v. *Zook*, 87 P. 638, 639-40 (Wash. 1906).

[56] *Davis* v. *Davis*, 106 A. 644, 645 (N.J. Ch. 1919) ("Procreation, if not the sole, is at least an important, reason for the existence of the marriage relation.").

[57] *De Burgh* v. *De Burgh*, 250 P.2d 598, 601 (Cal. 1952); *accord O'Connor* v. *O'Connor*, 253 N.E.2d 250, 258 (Ind. 1969) ("Marriage is the basic unit of our society. . . . [I]t encourages the exercise of intimate affections on a most personal basis; children are theoretically provided with a stable environment. . . .").

Numerous other courts linked marriage with bearing and rearing children.[58]

Twentieth-century treatises reiterated the same understanding of marriage and its basic purposes. Schouler explained that "[t]he word 'marriage' signifies . . that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife."[59] Keezer agreed: "A legal marriage is a union of a man and a woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children."[60]

Like Bishop, these early twentieth century authorities on domestic relations denied the validity of same-sex marriage. Schouler explained that "in order to constitute a perfect matrimonial union, the

---

[58] *See, e.g., In re Rash's Estate*, 53 P. 312, 313 (Mont. 1898); *Mahnken* v. *Mahnken*, 82 N.W. 870, 872 (N.D. 1900); *Wills* v. *Wills*, 82 S.E. 1092, 1093-94 (1914); *In re Oldfield's Estate*, 156 N.W. 977, 982-83 (Iowa 1916); *Mirizio* v. *Mirizio*, 150 N.E. 605, 607 (N.Y. Ct. App. 1926); *Kennedy* v. *Kennedy*, 134 So. 201, 203-04 (Fla. 1931); *In re St. Clairs Estate*, 28 P.2d 894, 897 (Wyo. 1934); *A.* v. *A.*, 43 A.2d 251, 252 (Del. Super. 1945); *Howay* v. *Howay*, 264 P.2d 691, 695-97 (Idaho 1953); *Zoglio* v. *Zoglio*, 157 A.2d 627, 628 (D.C. 1960); *Heup* v. *Heup*, 72 N.W.2d 334, 336 (Wis. 1969).

[59] JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS § 11 (1905); *accord* JOSEPH R. LONG, TREATISE ON THE LAW OF DOMESTIC RELATIONS § 3 (1905) ("Marriage is the civil status of a man and a woman legally united as husband and wife.").

[60] FRANK KEEZER, THE LAW OF MARRIAGE AND DIVORCE § 8 (1906).

contracting parties should be two persons of the opposite sexes."[61] Keezer, in turn, pointed out that "[t]here can be no marriage between any two persons of the same sex, and no kind of an attempted solemnization of such a marriage can be legal or valid."[62]

This historical narrative shows that marriage conceived as the exclusive relationship of a man and a woman is among the most deeply rooted institutions in our legal tradition. In those few instances when same-sex marriage was addressed family law experts like Bishop dismissed it as void. From early English law until the mid-twentieth century, the historical record affirms the traditional understanding of marriage while mentioning same-sex marriage rarely. More recent history demonstrates that the demands for same-sex marriage have been repeatedly and insistently rejected.

C. THE SAME 50-YEAR PERSPECTIVE THAT INFLUENCED *LAWRENCE* SHOWS THAT SAME-SEX MARRIAGE HAS BEEN WIDELY AND SPECIFICALLY REJECTED BY THE AMERICAN PEOPLE.

Lawrence v. *Texas* held that "our laws and traditions in the past half century are of most relevance" in explaining why the Fourteenth Amendment's protection of liberty encompasses a right to intimate

---

[61] SCHOULER, LAW OF THE DOMESTIC RELATIONS at § 18.

[62] KEEZER, THE LAW OF MARRIAGE AND DIVORCE at § 30.

autonomy. 539 U.S. at 571-72. The same historical time frame that justified the voiding of State anti-sodomy laws supports the validity of State marriage laws. The history of the past half century shows that the Nation has affirmatively rejected numerous efforts to redefine marriage. Traditional marriage has been generally reaffirmed even while ancient proscriptions against sodomy have dropped away and gay people have obtained new-found legal protection, respect, and dignity.

In *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), two men petitioned the Minnesota Supreme Court, to compel the State to grant them a marriage license. The court denied their due process and equal protection claims, emphasizing the purpose of marriage as "the procreation and rearing of children." *Id.* On appeal, the Court dismissed the case "for want of a substantial federal question." *Baker* v. *Nelson*, 409 U.S. 810 (1972). No Member of the Court entered a dissent.

Shortly after *Baker*, similar challenges in Kentucky and Washington were likewise dismissed. *Jones* v. *Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Singer* v. *Hara*, 522 P.2d 1187 (Wash. App. 1974).

Also in the 1970s, same-sex marriage figured among the reasons why the federal Equal Rights Amendment failed to gain adoption. Opponents alleged that ERA would "sanction homosexual marriage and child-rearing." DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION

1776-1995, at 411 (1996). Proponents took that charge seriously. The Amendment's chief Senate sponsor declared that the ERA "would not prohibit a State from saying that the institution of marriage would be prohibited to men partners . . [or] from two women partners."[63] Before joining the bench, Justice Ginsburg wrote that although, "[s]ome legislators . . have explained 'nay' votes on the ground that the ERA would authorize homosexual marriage," she insisted that "[t]he congressional history is explicit that the ERA would do no such thing."[64]

National debate over same-sex marriage was rekindled in 1993, when the Hawaii Supreme Court ruled that State law invalidly "denie[d] same-sex couples access to the marital status and its concomitant rights and benefits." *Baehr* v. *Lewin*, 852 P.2d 44, 67 (Haw. 1993). The court remanded for a determination whether Hawaii marriage laws satisfied strict scrutiny. *Id.* at 68. Before that remand could be carried out, the State adopted a constitutional amendment allocating authority over the definition of marriage to the legislature, which reaffirmed the traditional definition of marriage. HAW. CONST., art. I § 4. *Baehr* thus became moot. *Baehr* v. *Miike*, No.

---

[63] Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 584 & n. 50 (1973) (quoting 118 Cong. Rec. § 4389 (daily ed. Mar. 21, 1972)).

[64] Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 937 (1979).

20371, 1999 Haw. LEXIS 391 at *2 (Dec. 9, 1999) (unpublished).

Hawaii's experience made the prospect of same-sex marriage realistic. Many States responded by amending their laws to codify the conventional definition of marriage. As the decision below held, these laws cannot be fairly characterized as rooted in animus or bigotry. *See* Pet. App. 42a-43a. They placed no new burdens or conditions on gay people. They reflected, instead, a felt need to reaffirm the essential nature of marriage as a man-woman institution and resolve ambiguities in their State laws to shore them up against potential legal challenge. Each of the respondent States participated in this nationwide controversy over same-sex marriage.

In Michigan, "state law has defined marriage as a relationship between a man and a woman since its territorial days." 14-556 Pet. App. 16a.[65] But Hawaii's experience prompted Michigan to amend its law in 1996. That law was intended to clarify the historic understanding of marriage and its purposes: "Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order

---

[65] *See* An Act Regulating Marriages § 1 (1820), *supra* note 32 ("[M]ale persons of the age of eighteen years, and female persons of the age of fourteen years, not nearer of kin than first cousins, and not having a husband or wife living, may be joined in marriage.").

to promote, among other goals, the stability and welfare of society and its children." Mich. Comp. Laws § 551.1; *see id.* § 551.2.

Also in 1996, Tennessee passed a statute affirming[66] that marriage was reserved for a man and a woman. State public policy was declared to be that "the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." Tenn. Code § 36-3-113(a).

Kentucky responded similarly in 1998. It adopted statutes defining marriage as one man and one woman and articulating objectives much like Michigan's. *See* Ky. Rev. Stat. §§ 402.005, 402.020. 402.045. By reaffirming traditional marriage,[67] Kentucky

---

[66] *See* An Act Concerning Marriages § 3 (1741), *supra* note 30 ("[N]o Minister or Ministers, Justice or Justices of the peace, within any of the parishes of this government, shall celebrate the rites of matrimony between any persons, or join them together as man and wife, without license first had and obtained for that purpose. . . .").

[67] *See* An Act for Regulating the Solemnization of Marriages, ch. 41, § 1 (1798), *supra* note 20 ("[N]o minister shall celebrate the rites of matrimony between any persons, or join them together as man and wife, without lawful license. . . ."); *see also Jones*, 501 S.W.2d at 589 (Early on, Kentucky defined marriage as "the union of a man and a woman.").

evidently intended to remove any doubt resulting from judicial developments in Hawaii.[68]

In 2003, *Lawrence* held that the Fourteenth Amendment protects the liberty of "adult persons in deciding how to conduct their private lives in matters pertaining to sex." 539 U.S. at 572. But the Court reassured the country that its holding did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578 – much less same-sex marriage. This distinction between homosexual conduct and marriage mirrored the approach taken by the authors of the Model Penal Code.[69]

Within months of the decision in *Lawrence*, the Massachusetts Supreme Judicial Court held that denying marriage to same-sex couples violated the State constitution. *See Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Commonwealth issued licenses for its first same-sex marriages the following year. *Goodridge* is the milestone. Before it no State authorized the marriage of two men or two women. Even abroad, no foreign nation allowed

---

[68] *See* KENTUCKY BAR ASSOCIATION, HOT TOPICS IN DISSOLUTION OF MARRIAGE ACTS – THE STATUS OF SAME SEX MARRIAGE AND DIVORCE (2014) (stating that Kentucky was one of 27 States that passed legislation prohibiting same-sex marriage in reaction to the Hawaii case).

[69] 2 MODEL PENAL CODE AND COMMENTARIES § 213.2, Comment (1980) ("[L]egal marriage can exist only between man and woman.").

same-sex marriage until the Netherlands did in 2000. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). After Massachusetts took that initial step, other State courts and legislatures soon followed.[70]

The Hawaii and Massachusetts decisions also raised the widespread concern that "the courts would seize control over an issue that people of good faith care deeply about." 14-556 Pet. App. 42a. Events in Massachusetts drove other States to enact laws intended to prevent their own State courts from redefining marriage.

Michigan voters approved a constitutional amendment in 2004. Its stated purpose was "[t]o secure and preserve the benefits of marriage for our society and for future generations of children." MICH. CONST. art. I § 25. Official voter guidance indicated that the amendment's proponents believed that "amending the Constitution is necessary to avert a judicial interpretation of law allowing same-sex marriage, as occurred last year in Massachusetts."[71]

Ohio responded as well. In 2004, the legislature enacted a statute proclaiming that "[a] marriage may only be entered into by one man and one woman." Ohio Rev. Code § 3101.01(A)(1). That same year the

---

[70] *Kerrigan* v. *Dep't of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum* v. *Brien*, 763 N.W.2d 862 (Iowa 2009).

[71] SENATE FISCAL AGENCY, NOVEMBER 2004 BALLOT PROPOSAL 04-2, *available at* http://www.senate.michigan.gov/sfa/publications%5Cballotprops%5Cproposal04-2.pdf.

people of Ohio adopted a marriage amendment. Voters were told that approving the amendment was necessary "to preserve in Ohio law the universal, historic institution of marriage as the union of one man and one woman" and to "prohibit[ ] judges in Ohio from anti-democratic efforts to redefine marriage."[72]

2004 also marked the year that Kentucky voters approved a State constitutional amendment defining marriage as being between a man and a woman. *See* KY. CONST. § 233A. The official voter guide cited Massachusetts too. "Since the Massachusetts ruling, a national debate has emerged regarding marriage and whether marriage should be defined – in state constitutions and the U.S. Constitution even if it is defined in statute – as a union between one man and one woman."[73] The amendment's co-sponsor, State senator Gary Tapp, declared that "this pro-marriage constitutional amendment will solidify existing law so that even an activist judge cannot question the definition of marriage according to Kentucky law."[74]

---

[72] THE OHIO BALLOT BOARD, OHIO ISSUES REPORT: STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004 GENERAL ELECTION, at 4, http://www.sos.state.oh.us/sos/upload/elections/2004/OIR2004.pdf.

[73] KENTUCKY LEGISLATIVE RESEARCH COUNCIL, PROPOSED MARRIAGE AMENDMENT, 2004, *available at* http://lrc.ky.gov/lrcpubs/2004_const_amendment_1.pdf.

[74] KENTUCKY BAR ASSOCIATION, *supra* note 99, at 15 (quoting S. Debate, 108th Cong., 2nd Sess. (2004)).

Tennessee's marriage amendment was passed in 2006. *See* TENN. CONST. art. XI § 18. While campaigning for its passage, Senate sponsor David Fowler said that it was needed to "remov[e] the definition of marriage from the reach of activist judges by protecting it in the safety of our state Constitution."[75]

In 2008, California rejected same-sex marriage in a popular initiative known as Proposition 8. Challenged as unconstitutional, that measure eventually wound its way to this Court in *Hollingsworth*, 133 S. Ct. at 2652. Although the validity of Proposition 8 was squarely presented, the Court concluded that it could not reach that question because the official proponents lacked standing. *See id.* at 2668.

Since 1998, every State but New Mexico and Rhode Island directly considered whether to redefine marriage. As of 2013, when *Hollingsworth* was decided, 39 States had expressly rejected same-sex marriage, with 30 embodying their opposition in constitutional amendments adopted in statewide elections.[76]

---

[75] *Fowler Group to Have Bus Tour Promoting Marriage Amendment*, THE CHATTANOOGAN, Oct. 27, 2006, *available at* http://www.chattanooganoogan.com/2006/10/27/95482/Fowler-Group-To-Have-Bus-Tour-Promoting.aspx.

[76] States reaffirming traditional marriage include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, Nevada, North Carolina,

(Continued on following page)

These amendments, understood in their historical context, were not the fitful product of a "campaign of fear and misrepresentation." 14-556 Br. Pets. at 6. Voters did nothing untoward by "codif[ying] a long-existing widely held social norm already reflected in state law." Pet. App. 42a. State laws challenged here reaffirm the same husband-wife conception of marriage recognized in this Court's decisions as a fundamental right. Those laws are fully consistent with the Due Process Clause, whose central aim is "to prevent future generations from lightly casting aside important traditional values." *Michael H.*, 491 U.S. at 122 (footnote omitted).

But a sea change has brought same-sex marriage to many States over their objections. By some estimates, court decisions issued since 2013 have forced 21 States to accept same-sex marriage. But these lower court decisions do not evince a shift in the living tradition of American law. A fair assessment of traditions that the American people have accepted or rejected must discount those instances where the people themselves had no part in abandoning traditional marriage.

* * *

North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *See* Brief for National Ass'n of Evangelicals et al. as Amici Curiae Supporting Petitioners at 1a-13a, *Hollingsworth* v. *Perry*, No. 12-144 (containing a verbatim transcription of State provisions defining marriage in traditional opposite-sex terms).

History teaches that marriage between a man and a woman is one of the traditions from which the country has developed. It also teaches that marriage so understood has not been one of those "traditions from which [the country] broke." *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). To the contrary, same-sex marriage is not merely a new phenomenon. Petitioners assert a liberty interest that the country as a whole has rejected.

There is no historical foundation for a liberty interest in marrying a person of the same sex. It follows that the Fourteenth Amendment guarantee of "due process of law" does not include such a right.

CONCLUSION

For each of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

HERBERT G. GREY
4800 SW Griffith Drive, Suite 320
Beaverton, OR 97005-8716
503-641-4908
herb@greylaw.org

Counsel for Amici Curiae

April 3, 2015